(16)

FILED
JAN 28 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM—1943**

No. 646

BIRMINGHAM CORPORATION, *Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

RUSSELL D. MORRILL,
FRANCIS L. CASEY,
E. W. PAVENSTEDT,
*Counsel for Petitioner.*

January 27, 1944.

# INDEX


| | PAGE |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Question Presented | 2 |
| Statutes Involved | 2 |
| Statement | 2 |
| Specification of Errors to be Urged | 5 |
| Reasons for Granting Writ | 5 |


## CITATIONS

Cases:


| | |
|---|---|
| *Bleser, Estate of Daniel* v. *Comm.*, 41 B. T. A. 643 | 6 |
| *Clay, Zaida* v. *Comm.*, 40 B. T. A. 561 | 6 |
| *Degnan* v. *Comm.*, 136 F. (2d) 891 | 6 |
| *Haggar Company* v. *Helvering*, 308 U. S. 389 | 6 |
| *Lerner Stores Corp.* v. *Comm.*, 314 U. S. 463 | 6 |
| *Mead, C. H. Coal Co.* v. *Comm.*, 106 F. (2d) 388 | f.n. 5 |
| *Morrow, Becker & Ewing* v. *Comm.*, 57 F. (2d) 1 | f.n. 5 |
| *Mother Lode Co.* v. *Comm.*, 317 U. S. 222 | 6 |
| *Riley Investment Co.* v. *Comm.*, 311 U. S. 55 | 4, 5, 6 |
| *Scaife Company* v. *Comm.*, 314 U. S. 459 | 6 |

STATUTES:


| | PAGE |
|---|---|
| Congressional Record, Vol. 78, pp. 6240, 6308, 6326 | f.n. 7 |
| Judicial Code, §240(a) as amended | 1 |
| Regulation 86, Art. 351-7 | 2 |
| National Industrial Recovery Act of 1933 §215 | 6 |
| Revenue Act of 1934 | |
| Section 114(b)(4) | 6 |
| Section 351(d) | 2 |
| Revenue Act of 1935 §105 | 6 |

IN THE

# Supreme Court of the United States,

## OCTOBER TERM—1943

No. .....

BIRMINGHAM CORPORATION, *Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on November 1, 1943.

### Opinions Below

The opinion of the Tax Court of the United States (R. 14-22) is reported in 1 T. C. 808. The opinion of the Circuit Court of Appeals (R. 34-39) is reported in 138 F. (2d) 455.

### Jurisdiction

The judgment of the Circuit Court of Appeals was entered November 1, 1943 (R. 40). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## Question Presented

Whether the conditions of Section 351(d) of the Revenue Act of 1934 were complied with in this case so that personal holding company surtax for the year 1935 should not apply to the taxpayer.

## Statutes Involved

Revenue Act of 1934

> Sec. 351. SURTAX ON PERSONAL HOLDING COMPANIES.
>
> * * * * *
>
> (d) *Payment of surtax on pro rata shares.*—The tax imposed by this section shall not apply if all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire pro rata shares, whether distributed or not, of the "adjusted net income" of the corporation for such year. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. * * *

Regulation 86

> Art. 351-7.
>
> *Payment of surtax on pro rata shares.*—The surtax imposed by section 351 does not apply to any taxable year if every shareholder includes, at the time of filing his return, in his gross income his entire pro rata share of the adjusted net income of the corporation for the taxable year of such corporation ending with or during his taxable year. * * *

## Statement

The facts as found by the Tax Court (R. 16-18) may be summarized as follows:

In 1935 the taxpayer, Birmingham Corporation, was a personal holding company, all of the stock of which was owned by Otto Marx, Sr., his wife, two sons, and a trust for

a daughter. Being a family personal holding company dominated by Otto Marx, Sr., the husband and father, the conduct of its affairs was informal. In December 1935 Otto Marx, Sr. determined it would be advantageous not to distribute the earnings of the corporation for that year and proposed to the other members of the family that each stockholder include in his individual return his pro rata share of the corporation's net income for that year. All of the stockholders agreed to this proposal. The income tax return and the personal holding company return of the petitioner corporation and the individual income tax returns of all of the stockholders were filed timely and included pro rata shares of the corporation's net income, in accordance with this agreement, with one exception, the return of Henry Marx which was filed under the following circumstances:

Henry Marx first filed his return for 1935 on February 20, 1936 and failed to include his pro rata share of the corporation's net income. On March 7, 1936 he filed an amended return which also failed to include his pro rata share of the corporation's net income. On or about March 8th or 9th, 1936 Henry Marx was informed by the corporation's secretary of the amount of his pro rata share. At this time Henry Marx was busy in professional work as a lawyer and neglected to take immediate steps to correct his mistake of failing to include his share of the corporation's net income in his original or first amended return. However, on March 28, 1936 Henry filed a second amended return and included therein his pro rata share of the corporation's net income. Late in April or early in May, 1936 Henry Marx received a request from the Collector of Internal Revenue for additional surtax with respect to his second amended return which he paid.

The Commissioner held that the requirements of 351(d) of the Revenue Act of 1934 had not been met because of the late filing of Henry's return including his share of the corporation's net income and determined a deficiency of personal holding company surtax against the corporation

of $11,904.76 (R. 15). The Tax Court approved the Commission's action and held that Section 351(d) provided strict requirements which it was without power to relax and which did not permit of an amended return after the due date even to correct an omission due to mere innocent oversight. The Tax Court relied upon the decision of this Honorable Court in *Riley Investment Co.* v. *Commissioner*, 311 U. S. 55 (R. 22).

The majority of the Circuit Court agreed with the Commissioner and the Tax Court that the second amended return of Henry Marx did not measure to compliance with the requirements of the law and held that Section 351(d) must be complied with strictly to the letter, citing the *Riley* decision *supra* (R. 34-36).

Judge Waller, however, wrote a vigorous dissenting opinion (R. 37-39) on the ground that to permit the filing of the amended return by Henry Marx only 13 days late to correct an error and oversight would be in accordance with an immemorial policy of the Treasury Department (except where the statute expressly provides otherwise) to permit a taxpayer seasonably to correct errors and oversights in his return; that an extension of time for filing to beyond the date filed could have been granted by the Collector of Internal Revenue and that the acceptance by the Collector of Internal Revenue of the amended return and the tax was equivalent to the granting *nunc pro tunc* of an extension of time for correcting the original return. Judge Waller distinguished the *Riley Investment Co.* decision on the ground that an extension of time could not under the statute have been granted for the length of time which the taxpayer took in that case to correct its error.

## Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that Section 351(d) of the Revenue Act of 1934 required compliance strictly to the letter thereof.

2. In applying and interpreting the *Riley Investment Co.* decision *supra* to require such strict construction of the statute here in question.

3. In failing to distinguish the decisions of this Court and the various Circuit Courts under other statutes by the express terms of which or in order to prevent abuses a strict interpretation was required.

4. In failing to hold that an amended return was permissible in this case within the dictum of the *Riley* decision to correct error in the original return of one minority stockholder and carry out the purpose of Congress.

## Reasons for Granting Writ

The writ of certiorari should be granted in this case to prevent the doing of an injustice and to dispel the doubt as to the acceptability, in the absence of clearly prohibitive reasons, of an amended tax return to correct an error even though filed after the due date. As Judge Waller so aptly stated in his dissenting opinion in this case (R. 37) "The right of a taxpayer to have his return speak the truth and accurately reflect his income is not only grounded in long standing policy and precedent but in common honesty and good morals." There is no prohibition in the statute and no reason based on the facts or governmental policy for refusing to allow in this case the correction of an error, not made by the taxpayer but by a minority stockholder, which penalizes the corporation taxpayer and all of the other stockholders and thwarts the purpose of the law.

The decision of the Circuit Court in this case and other decisions[1] promote confusion and conflict with respect to

[1] *Morrow, Becker & Ewing* v. *Commissioner*, 57 F. (2d) 1; *C. H. Mead Coal Co.* v. *Commissioner* (C. C. A. 4) 106 F. (2d) 388.

the conditions under which an amended return may be filed and accepted to correct an error. Other Tax Court decisions[2] uphold a liberal interpretation of Section 351(d) or a similar statutory provision on behalf of the Government.

This Court has clearly laid down the rule under the capital stock tax statutes[3] which require a declaration in a "first return" and specifically prohibit amendment, that an amended return may not be accepted to correct an error unless filed on or about the due date or before the passage of an extended due date. *Haggar Company* v. *Helvering,* 308 U. S. 389; *Scaife Company* v. *Commissioner,* 314 U. S. 459; *Lerner Stores Corp.* v. *Commissioner,* 314 U. S. 463.

Also the decisions of this Court consistently hold that where the statute requires an election shall be made in a first return as in the case of percentage depletion,[4] the election may not be made in an amended return filed after the due date or an extended due date. *J. E. Riley Investment Co.* v. *Commissioner,* 311 U. S. 55; *Mother Lode Company,* 317 U. S. 222; *Degnan* v. *Commissioner,* C. C. A. 9; 136 F. (2d) 891; 64 Supreme Court 93, cert. den.

On the other hand, in the *J. E. Riley Investment Company* decision *supra,* this Court was careful to point out that it was "not dealing with an amendment designed merely to correct errors and miscalculations in the original return", thus recognizing that there were circumstances under which an amended return was permissible even after the expiration of the due date.

---

[2] *Estate of Daniel Bleser, et al.* v. *Commissioner,* 41 B. T. A. 643; *Zaida Clay,* 40 B. T. A. 561.

[3] Section 215 National Industrial Recovery Act of 1933; 48 Stat. 195, 207; Section 105 Revenue Act of 1935; 49 Stat. 1014, 1017.

[4] Section 114(b)(4) of the Revenue Act of 1934; 48 Stat. 680 * * * "A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election made."

It is respectfully submitted that this case properly falls within the class of cases where an amended return to correct an error due to innocent oversight is permissible even after the expiration of the due date for filing returns. The statute, Section 351(d), does not prohibit amendments and does not even require that the shares of the corporate net income be included in a "first return". It specifies merely "at the time of filing their returns". Furthermore, the statute does not require an election such as to deduct depletion on the basis of percentage or cost, to file a joint or separate return or to report income from sales on the deferred or installment basis. It merely provides that where the purpose of Congress[5] to subject personal holding company income to individual surtaxes is accomplished by the stockholders voluntarily including their shares of the corporate net income in their returns, the corporation shall not be subject to the penalty surtax.

The conditions of the statute were complied with by the taxpayer corporation and all but one small stockholder who voluntarily and in accordance with his previous agreement corrected his omission of his share of income after a delay of only thirteen days. An extension for so short a period of the time for filing the amended return could have been granted under Section 53 of the Revenue Act of 1934. In this case the acceptance of an amended return, filed within a short time after the due date and within the time within which an extension might have been obtained, violates no statutory prohibition nor administrative policy, and carries out the agreement of the stockholders and the purpose of Congress.

For the foregoing reasons it is respectfully submitted that this petition should be granted.

RUSSELL D. MORRILL
FRANCIS L. CASEY
E. W. PAVENSTEDT
*Counsel for Petitioner.*

January 27, 1944.

---

[5] Congressional Record, Volume 78, Pages 6240, 6308 and 6326.